Supreme Court, U.S.
FILED
04139 APR 13 2005

No.: _____

In The

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER OXLEY, *Petitioner,*

v.

STATE OF LOUISIANA, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Louisiana

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

I. Whether, in light of the United States Supreme Court decision in Blakely v. Washington, 124 S.Ct. 2531 (2004), the sentencing court violated Christopher Oxley's Sixth Amendment right to trial by jury when it imposed sentence on him based on other alleged criminal activity not presented to a jury for consideration?

II. Is the sentence of ninety-nine years without benefit of probation, parole, or suspension of sentence, for a first-time offender convicted of the armed robbery excessive or cruel and unusual, in violation of the Eighth Amendment and/or the Louisiana Constitution?

III. Must a Louisianasentencing court articulate its consideration of mitigating factors in imposing a sentence upon a defendant?

PARTIES TO THE PROCEEDING

The following individuals are parties to the proceeding in the court below:

Christopher Oxley; *Plaintiff-Appellant*;

State of Louisiana; *Defendants-Appellees*.

CORPORATION DISCLOSURE STATEMENT

No parties hereto are corporations. Sup. Ct. R. 29.6.

BEST AVAILABLE COPY

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Christopher Oxley respectfully prays that a writ of certiorari be issued to review the judgment ofthe Supreme Court of the State of Louisiana in this case.

OPINIONS BELOW

The opinions of the Supreme Court of the State of Louisiana (App. A) and the Louisiana Court of Appeal, First Circuit(App. A) are reported as follows:

State of Louisiana v. Christopher D. Oxley, 889 So. 2d. 265 (La. 1/14/05);

State of Louisiana v. Christopher D. Oxley, 874 So. 2d. 435 (La. App. 1 Cir. 5/15/04);

State of Louisiana v. Christopher D. Oxley, 861 So. 2d. 553 (La. 12/19/03);

State of Louisiana v. Christopher D. Oxley, 844 So. 2d. 420 (La. App. 1 Cir. 5/09/03).

JURISDICTION

The judgment of the Supreme Court of the State of Louisiana was entered on January 14, 2005, (App. A). This Court has jurisdiction pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the United States Constitution declares: "Excessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S.C.A. Const. Amend. VIII

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed , which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defence.

U.S.C.A. Const. Amend. VI

The United States Constitution provides that no "State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S.C.A. Const. Amend. XIV

Article I, § 20 of the Louisiana Constitution of 1974 provides, in pertinent part, that "[n]o law shall subject any person to . . . to cruel, excessive, or unusual punishment. La. Const. Art. 1, § 20.

La. C.Cr. P. art. 894.1

La. R.S. 14:64

STATEMENT OF THE CASE

Christopher Oxley was charged by bill of information with one count of Armed Robbery in violation of Louisiana Revised Statute 14:64.[R. 37]. According to the Incident Report, on the evening of October 5, 1999, an armed robbery occurred at the Chevron convenience store located on Rushing Road in Denham Springs, Louisiana. At that time, the sole employee working in the store was one Carissa Williams. Mr. Oxley, along with K.R. and Gary Calligan, were all arrested in the instant matter for armed robbery.

The undisputed facts are as follows: on October 5, 1999, an armed robbery occurred at the Chevron convenience store located on Rushing Road in Denham Springs, Louisiana. K.R, a juvenile, who was seventeen at the time of the robbery, along with Gary Calligan, entered the store and asked to use the restroom. After using the restroom Calligan left the store. K.R. then informed the clerk that the toilet was overflowing. When the clerk, Ms. Williams went to check on the toilet, the

juvenile pointed a gun at her and ordered her back into the bathroom. The juvenile then ordered that she remove her employee shirt. Across the street at Circle K, an employee noticed suspicious activity and called the police. Ms. Williams was locked in the bathroom the entire time of the robbery.

K.R. was still inside the store when police arrived. The other individual who had gone into the store with K.R. left on foot prior to the officers' arrival at the scene. This individual was later identified as Gary Calligan, who was later arrested in Baton Rouge.

Upon arrival at the scene, officers noted a subject with a green jacket exit the store. Officer Delrie then located Christopher Oxley in the area behind the McDonald's, two lots over from the Chevron Station, and placed him under arrest. Oxley maintained to the officers that he knew nothing about any robbery and that he had gone behind McDonald's to urinate. [R. 63].

Upon apprehending Oxley, the officers walked him back to the Chevron station to have Ms. Williams identify him. She indicated that she knew Oxley as a former coworker that she had seen one time before, but that she had not seen him inside the store on the evening of the robbery. [R. 262, 575; Tr. 235]. She was, however, able to identify K. R. as having been in the store. Less than $300.00 was taken during the robbery. Mr. Oxley was never identified as being inside the store by the clerk who had actually worked with Mr. Oxley. No one was injured in the robbery.

I. The First Denial.

Pursuant to a trial of this matter, Oxley was convicted of armed robbery on September 13, 2001. [R. 24-26]. Thereafter, based upon the discovery of a new witness to whom K.R. had admitted giving false testimony and framing Oxley, defense counsel moved for a new trial. This matter was brought before the trial court on April 10, 2002 at which time arguments were presented by both the State and defense counsel. Further

testimony was taken from one Willie Bush, (hereinafter referred to as "Bush"), who testified that he was acquainted with K.R. and that he in fact was presently living with K.R.'s mother. [R. 306-321].

Bush stated that K.R. had told him that, although he and Calligan had gotten a ride to Denham Springs with Mr. Oxley, Christopher Oxley was nowhere around when the robbery occurred. [R. 309]. K.R. also told Bush that they had implicated Oxley because Oxley had allegedly "ratted" on K.R. [R. 308-309]. Bush further indicated that K.R. had planned the robbery to get money to help his mother who had been previously robbed. [R. 308, 312]. Bush further stated that his motivation for coming forward was to tell the truth and to let the trial court know what had happened and what K.R. had told him. [R. 310]. Notwithstanding Bush's revealing K.R.'s false testimony and the framing of Mr. Oxley by K.R., the trial court denied the motion for a new trial.

Thereafter, on that date, April 10, 2002, the trial court addressed the issue of sentencing Mr. Oxley. It was stipulated that Mr. Oxley, who had graduated from high school, had never had any behavioral problems in school and that he had no prior criminal record. [R. 329]. Notwithstanding this stipulation, or the fact that Oxley was, at the time, gainfully employed, the trial court sentenced Mr. Oxley to serve ninety-nine years with the Department of Corrections without benefit of probation, parole, or suspension of sentence. [R. 332].

Although the State stipulated to the presence of mitigating factors, there is no indication in the record these were considered by the trial court in sentencing Mr. Oxley, as required by La.C.Cr.P. art. 894.1.

On April 16, 2002, defense counsel moved the trial court to reconsider the draconian sentence imposed upon Mr. Oxley. [R. 292-294]. Said motion was summarily denied on that date. [R. 293]. Thereafter, on April 17, 2002, defense counsel moved for appeal; the district court so granted, and a return date of July 25, 2002 was

set. [R. 295-298].

The decision on appeal was handed down on May 9, 2003 and received by the Plaintiff on May 12, 2003 [R.1017-1032]. The Louisiana First Circuit Court of Appeal found that the trial court committed patent error in sentencing Mr. Oxley without his waiving the minimum delay of twenty-four hours between the denial of the motion for new trial and the imposition of sentence. The transcript did not reflect that Mr. Oxley waived that right under La. C.Cr.P. art. 873. The Court of Appeal found that this wasnot harmless error and remanded the case to the trial court for re-sentencing [R. 1031].

In a concurring opinion filed by Honorable Judge Philip C. Ciaccio of the First Circuit, Judge Ciaccio found that:

> However, I believe that the reference to the other crime, i.e., the direction to murder the store employee, was highly prejudicial and served to inflame not only the jury but also the trial judge as evidenced by the draconian life imprisonment sentence imposed upon a first time offender. [R. 1032].

With this decision, Mr. Oxley was set for re-sentencing.

II. The Second Denial.

The re-sentencing took place on June 24, 2003. At that time, Mr. Oxley was sentenced again to the maximum allowable sentence of 99 years without probation, parole, or suspension of sentence. At the second sentencing of this matter, the trial court found that:

> [T]here would have been a death associated with this, not just an armed robbery. Because of the particular nature of **all of the crime**, because of the fact **there would have been a death associated with this**,

> because he (Mr. Oxley) was, in fact, the mastermind of this, the court is going to designate this as a crime of violence and does impose the 99 year sentence. (Emphasis added). [R. 1012]

Once again, the trial court did not indicate that it considered any of the mitigating factors which were stipulated to by the State, in re-sentencing Mr. Oxley.

III. The Third Denial.

On October 29, 2003, a timely appeal of the second sentence of 99 years was filed with the Louisiana Court of Appeal for the First Circuit. Oral arguments were heard on April 7, 2004. The First Circuit issued a ruling on May 14, 2004, which was received by Petitioner Oxley on May 17, 2004.

There was a split in the three judge panel of the Louisiana First Circuit. Two judges found that the sentencing court properly found that Mr. Oxley was the "worst kind of offender," however, Judge Downing dissented, finding the sentence to be excessive, as follows:

> I dissent. If defendant had been tried for conspiracy to commit first-degree murder, his maximum sentence would have been thirty years. La. R.S. 14:26(b). If he had been tried for attempted first-degree murder, his exposure would have been not less than ten nor more than fifty years without benefit of parole, probation, or suspension of sentence. La. R.S 27(D)(1)(a). Accordingly, I would find the defendant's sentence of ninety-nine years without benefit of parole, probation, or suspension of sentence of being a principal to armed robbery to be excessive.

Petitioner subsequently petitioned for a writ of review to the Supreme Court of the State of Louisiana.

IV. The Proceedings Below

The Supreme Court of the State of Louisiana, denied the Writ of Certiorari and/or Review on January 14, 2005 without written opinion.

REASONS FOR GRANTING THE PETITION

Pursuant to Rule 10[c), a state court has decided an important federal question in a way that conflicts with relevant decisions of this Court. For this compelling reason, exercise of this Honorable Court's supervisory power is appropriate to safeguard the rights of the Petitioner herein.

I. Whether, in light of the United States Supreme Court decision in Blakely v. Washington, 124 S.Ct. 2531 (2004), the sentencing court violated Christopher Oxley's Sixth Amendment right to trial by jury when it imposed sentence on him based on other alleged criminal activity not presented to a jury for consideration?

In Blakely, this Court held that a defendant has a constitutional right to have a jury determine, beyond a reasonable doubt, all facts essential to his sentence. Therein, the defendant had pled guilty to second degree kidnaping, domestic violence, and firearms allegations, which charges were the result of a plea agreement with the State, that had reduced the charge from first degree kidnaping.

At sentencing, the trial court enhanced the maximm allowable sentence for the charges pled to, under a provision of Washington state law, which allows enhancement if the court finds "substantial and compelling reasons justifying an exceptional sentence." Pursuant to Washington law, the trial court must make findings of fact to support the reasons for imposing the exceptional sentence

The trial court enhanced the defendant's sentence from the maximum of 53 months, to 90 months, an increase of 37 months, citing "deliberate cruelty" on the part of the defendant as justification for the

enhancement. Following objection to the sentence by the defendant, a hearing was held during which the trial court articulated certain facts which it found justified a finding of deliberate cruelty, so as to enhance the defendant's sentence.

On appeal, the defendant argued that he was deprived of his Sixth Amendment right to trial by jury because the jury did not make a determination of the facts upon which his sentence enhancement was based.

This Court agreed, applying its holding in Apprendi v. New Jersey, 530 U.S. 466 (2000), which found a violation of defendants' constitutional rights when a sentence was enhanced without the required factual findings by a jury.

This case is on point with this Court's decisions in Blakely and Apprendi, and requires that Mr. Oxley's sentence be overturned.

Although Mr. Oxley's sentence of 99 years is nominally within the statutory range allowable for armed robbery, under Louisiana law, sentencing judges do not have unbridled discretion in imposing sentence within the statutory limits. State v. Cox, 369 So.2d 118, 120-121 (La.1979); State v. Pike, 426 So.2d 1329 (La. 1983).

Louisiana Code of Criminal Procedure art. 894.1 provides sentencing guidelines, which includes a list of enhancing and mitigating factors which must be considered by the sentencing court. Furthermore, the court must articulate the considerations taken into account and the factual basis therefor in imposing sentence. State v. Soco; La. C.Cr.P. Art. 894.1. (See Appendix for full text).

Of the factors to be considered, the important elements are the defendant's personal history (age, family ties, marital status, health, employment record), prior criminal record, seriousness of offense and the likelihood of rehabilitation. State v. Jones, 398 So.2d 1049 (La.1981); State v. Bradford, 29,519 (La. App.2d Cir.4/2/97), 691 So.2d 864; State v. Hudgins, 519 So.2d

400 (La.App. 2d Cir.1988), writ denied, 521 So.2d 1143 (La.1988).

At sentencing of this matter, the trial court articulated its reasons for enhancing the sentence[1], as follows:

> . . . And the court is going to designate this as a crime of violence and assigns such reasons all of the testimony that was adduced at the trial, including the testimony of the victim who said that she would have been murdered, but for the fact of her race. One of the defendants was sixteen at the time of the testimony, and said that **he was instructed to kill the individual who was working in there**. And his statement, as I recall it, from the stand was that he didn't kill his own kind. **But for that, there would have been a death associated with this, not just an armed robbery.** Because of the particular nature of all of the crime, **because of the fact there would have been a death associated with this**, the court is going to designate this as a crime of violence and does impose the 99 year sentence. [R. 1012] Emphasis added.

The court's findings were apparently based on testimony of the minor co-defendant, K.R., that Mr. Oxley, although he did not wield a weapon, or in fact appear in front of the victim at all, was the "mastermind" of the robbery and that Mr. Oxley had told K.R. to kill

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1 As previously discussed, the Court of Appeal found there was patent error in the first sentencing hearing, in that there was not a 24 hour delay between the denial of the request for a new trial and sentencing. Therefore, the first sentence was vacated and a second sentencing hearing was held. However, the trial court imposed the same sentence on both occasions.

whoever was in the store. K.R. testified he did not do so because he "doesn't kill his own kind." (meaning his own race).

Thus, the only factor articulated by the trial court in sentencing Mr. Oxley was the seriousness of the offense, and the seriousness of the offense was based on alleged "facts" not subject to determination by a jury of Mr. Oxley's peers. These enhancing "facts", which the sentencing court articulated as the basis for applying the maximum sentence under the law, although constituting criminality, were not elements of the crime with which Mr. Oxley was charged. Thus, Mr. Oxley was not afforded the jury to trial by jury on these other alleged criminal acts.

The elements of an armed robbery pursuant to La. R.S. 14:64 are:

1) the taking of a thing of another,
2) from the person of another or that is in the immediate control of another,
3) by use of force or intimidation, and
4) while armed with a dangerous weapon.

These elements are the sole elements before the jury upon which factual findings were made, and which resulted in the conviction of Mr. Oxley for armed robbery.

Significantly, Mr. Oxley was not charged with, nor was the jury asked to consider a charge of conspiracy, which would have required the jury to consider those elements of the crime, which would include:

1) agreement or combination between two or more persons,
2) for the specific purpose of committing any crime, and
3) one or more parties acts in furtherance of the object of the agreement or combination.

La. R.S. 14:26.

Nor was Mr. Oxley charged with solicitation of murder pursuant to La. R.S. 14:28.1, which includes as its elements:

1) intentional solicitation by one person of another,
2) to commit or cause to be committed a first or second degree murder.

La. R.S. 14:28.1

There was absolutely no finding by the jury inherent in the conviction for armed robbery which would suggest that the jury found that Mr. Oxley was either the mastermind of the crime, or that he issued an order to K.R. to kill the store occupants. In fact, no one was injured during the robbery and Mr. Oxley was not seen or even placed within the store at the time of the crime by the only victim.

Like the defendant in Blakely, the sentence of Mr. Oxley was based on findings by the trial court which were not submitted to the jury for consideration, and, therefore, was violative of Mr. Oxley's Sixth Amendment right to a jury trial.

Unlike the defendant in Blakely, where the court imposed a sentence in excess of the statutory maximum, citing enhancing factors, the maximum statutory sentence to which Mr. Oxley was exposed, under the statute for armed robbery in Louisiana, was 99 years, without probation, parole or suspension of sentence, which was the sentence he received. La. R.S. 14:64.

Nevertheless, Louisiana law does not allow unbridled discretion to impose sentences within the statutory range. Maximum sentences are reserved for the "worst kind of offender." State v. Quebedeaux, 424 So.2d 1009, 1014 (La. 1982).

In Blakely, this Court found "that the statutory maximum for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" In this case, the sentencing court specifically made a factual that Mr. Oxley was the "mastermind" and that a "death would have occurred" but for the fact that the juvenile K.R. did not "kill his own kind."

However, a death did not occur. The victim was

locked in the restroom during the robbery and was uninjured. Although the Louisiana court of appeal noted that there was testimony that Mr. Oxley wanted the clerk killed because he might be recognized, removing the videotape and locking the clerk in the bathroom were sufficient to prevent his recognition.

It is clear from the sentencing transcript that the sentencing court applied the maximum sentence based on its own findings of fact that Mr. Oxley attempted to cause the clerk to be killed. This was a finding of fact of another crime, which was not an element of armed robbery, and which was not submitted to a jury to determination by proof beyond a reasonable doubt.

Of course there are instances in which the sentencing court must make factual findings. However, in this particular instance, the findings made were that of other crimes, and were the reason articulated by the court for imposing the maximum sentence on Mr. Oxley. In doing so, Mr. Oxley was deprived of his right to be tried by a jury for the crime for which he was penalized.

Therefore, in accordance with Blakely, Apprendi, and Louisiana law, the sentence imposed on Christopher Oxley exceeded the maximum sentence the trial court could impose without findings by the jury of enhancing factors articulated by and applied by the trial court to reach the 99 year maximum sentence.

In the matter of State v. Morgan, 791 So.2d 100, 103 (La. 6/29/01), the Louisiana Supreme Court held that evidence of that defendant's previous alleged rapes, for which he was not charged were not admissible to reveal his purported "lustful" predisposition to engage in non-consensual sex, or for any other valid purpose. The Supreme Court further determined that the trial court's admission of such evidence did, in fact constitute harmful error. As such, said matter was reversed and remanded.'

The trial court erred in enhancing Mr. Oxley's sentence over that range of sentences found by Louisiana

courts to be appropriate for a first offender for the crime of armed robbery. The enhancement was based on factual findings by the court ofother crimes for which Mr. Oxley was not tried by a jury. As is obvious from the transcript of re-sentencing, Mr. Oxley was sentenced based on the trial court's own belief that Mr. Oxley either solicited murder, attempted murder, or conspired to commit murder, not for the armed robbery for which he was actually convicted. Therefore, in accordance with the aforementioned statutory and jurisprudential authorities, the sentence should be overturned, and Mr. Oxley remanded for re-sentencing.

II. Is the sentence of ninety-nine years without benefit of probation, parole, or suspension of sentence, for a first-time offender convicted of armed robbery excessive or cruel and unusual, in violation of the Eighth Amendmen and/or the Louisiana Constitution?

The Eighth Amendment of the U.S. Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S.C.A. Const. Amend. VIII. Similarly, Article I, § 20 of the Louisiana Constitution of 1974 provides, in pertinent part, that "[n]o law shall subject any person to . . . to cruel, excessive, or unusual punishment. La. Const. Art. 1, § 20.

This provision of Louisiana's Constitution gives appellate courts a basis for reviewing sentences imposed in individual cases to determine whether the sentences are constitutionally excessive. State v. Sepulvado, 367 So.2d 762 (La. 1979); State v. Johnson, 709 So.2d 679 (La. 3/4/98). Unlike its federal counterpart, Article 1, § 20 explicitly prohibits excessive sentences. State v. Baxley, 656 So.2d 973 (La. 5/22/95); La. Const. Art. 1, § 20.

The deliberate inclusion by the redactors of Louisiana's Constitution of a prohibition against "excessive", as well as cruel and unusual punishment,

broadened the duty of Louisiana's appellate courts to review the sentencing aspects of criminal statutes. State v. Goode, 380 So.2d 1361, 1363 (La.1980); Baxley, supra. The constitution's explicit protection against excessive punishment permits the appellate courts to determine both whether the range of sentences authorized by a criminal statute is excessive as well as whether the sentence of the particular offender is excessive, though within the statutorily prescribed range. State v. Guajardo, 428 So.2d 468, 472 (La.1983); State v. Ludwig, 468 So.2d 1151, 1152 (La. 1985); Baxley, supra.

More simply stated, although a sentence may fall within the statutory limits, it may nevertheless violate a defendant's state constitutional right against excessive punishment and is, therefore, subject to appellate review. State v. Lindsey, 770 So.2d 339 (La. 10/17/00), certiorari denied by Lindsey v. Louisiana, 532 U.S. 1010, 121 S.Ct. 1739, 149 L. Ed.2d 663; State v. Sepulvado, 367 So.2d 762 (La. 1979).

A punishment is unconstitutionally excessive if it makes no reasonable contribution to acceptable goals of punishment and, hence, is nothing more than the purposeless and needless imposition of pain and suffering, or is grossly out of proportion to the severity of the crime. State v. Dorthey, 623 So.2d 1276, 1280 (La.1993); State v. Reed, 409 So.2d 266, 267 (La. 1982); State v. Tompkins, 429 So.2d 1385, 1386 (La. 1983); Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L. Ed.2d 836 (1991); Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L. Ed.2d 982 (1977); Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L. Ed.2d 335 (2002).

A sentence is unconstitutionally excessive if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. State v. Weaver, 805 So.2d 166 (La. 1/15/02);

Under Louisiana law, maximum sentences are typically reserved for cases of the worst offender *and* the

worst offense. State v. Soco, 441 So.2d 719 (La.1983).

In considering whether punishment is cruel or unusual in violation of the Eighth Amendment, this Honorable Court has found that sentencing should be proportionate to the crime. Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed. 2d 637 (1983).

Factors recognized in analyzing cases under the Eighth Amendment, include:

1) the gravity of the offense and the harshness of the penalty,
2) sentences imposed on other criminals in the same jurisdiction, and
3) sentences imposed for the same crime in other jurisdictions.

Solem , at 290-292.

The gravity of the offense, while not to be diminished, does not justify the harshness of the penalty for a first-time offender. Mr. Oxley was convicted as a principal to armed robbery. He wielded no weapon and no one was injured in the robbery. Nevertheless, the harshest penalty available in our system of law, other than for capital murder, was imposed upon him. Although the sentence was for a period of 99 years, it is tantamount to life in prison, as there is no provision for probation, parole, or suspension of sentence.

In twelve of the fifty states, the sentence imposed on Mr. Oxley is the harshest available, amounting to life in prison. Thus, in those states, the sentence for armed robbery given to Mr. Oxley would be the same as that of a serial killer or other murderer.

The sentence imposed on Mr. Oxley is equal to that of the Eric Rudolph, who recently was sentenced to life as part of a plea agreement. To impose this sentence on a twenty four year old first time offender, where no injury occurred or harm actually threatened is disproportionately excessive, and constitutes cruel and unusual punishment.

The sentence imposed on Mr. Oxley, also exceeds

that imposed on other criminals in Louisiana.

Judge Downing of the Louisiana First Circuit Court of Appeal dissented from his colleagues opinion on appeal and found the sentence of Mr. Oxley to be excessive. He noted in his dissent the fact that a conviction for conspiracy to commit first-degree murder carries a maximum sentence of thirty years (La. R.S. 14:26(b)) and the sentence for attempted first-degree murder carries a maxim um of fifty years without benefit of parole, probation, or suspension of sentence. La. R.S. 27(D)(1)(a). (Appendix A).

Similarly, the sentence for solicitation for murder carries a penalty range of not less than five, nor more than twenty years at hard labor. La. R.S. 14:28.1.

Thus, sentences for criminals accused of more serious crimes, crimes which actually contain elements of the "enhancing crime" found by the sentencing court, carry sentences much less than that imposed on Mr. Oxley.

Furthermore, a review of Louisiana cases demonstrates that other first offenders convicted of armed robbery routinely receive sentences well below that imposed on Mr. Oxley. In State v. Smith, 2001-2574 (La. 1/14/03), 839 So. 2d 1, the Louisiana Supreme Court reviewed the reversal by the court of appeal of a 40 year sentence for armed robbery for excessiveness. The Louisiana Supreme Court reinstated the sentence noting that the sentence was "within the thirty-five to fifty year range this court has found acceptable for first offenders convicted of armed robbery", citing State v. Thomas, 98-1144, p. 2 (La. 10/9/98), 719 So.2d 49, 50 (upholding imposition of consecutive sentences where total was still within range for first offender); and State v. Augustine, 555 So.2d 1331, 1332 (La. 1990), (upholding a 40 year sentence for a first offender).

In State v. Watson, 575 So. 2d 411 (La. App. 4th Cir. 1991), a defendant received a sentence of fifty years without benefit of probation, parole, or suspension of

sentence for armed robbery. He had a previous for armed robbery.

In State v. Smith, 516 So.2d 210 (La. App. 4th Cir. 1987), a sentence of fifty years was imposed for an armed robbery where the defendant had placed a gun to the victim's head and taken his car. The defendant had a prior criminal record of aggravated battery.

In State v. Davis, 593 So.2d 358 (La. App. 4th Cir. 1992), a defendant was sentenced to 20 years without benefit of probation, parole or suspension of sentence, for each of three armed robberies he had committed. The sentences were to be served consecutively. He had a juvenile record and a prior felony conviction for theft.

In State v. Mitchell, 442 So.2d 806, (La. App. 4th Cir. 1987), a first time offender with an extensive arrest record was sentenced to fifty years for the armed robbery of a fourteen year old girl.

In State v. Smith, 2001-2574 (La. 1/14/03), 839 So. 2d 1, the Louisiana Supreme Court reviewed the reversal by the court of appeal of a 40 year sentence for armed robbery for excessiveness. Finding the sentence within the statutory allowable range for first offenders, the Louisiana Supreme Court reinstated the sentence, noting the defendant had fired shots at pursuers and was on probation for a prior felony out-of- state, and had stolen $400,000 of merchandise.

In State v. Green, 38-335 (La. App. 2 Cir. 5/12/04), 873 So.2d 889, a defendant was sentenced to 49 ½ years for armed robbery as a second felony offender, where he was employed and had finished high school. Although no one was hurt, the victim was made to kneel at gunpoint.

In State v. Ortego, 382 So.2d 921 (La. 1980), the Louisiana Supreme Court was called upon to review for excessiveness, a sentence to two consecutive twenty (20) year sentences for two counts of armed robbery which arose out of a single course of conduct. One of the victims had been abducted at gunpoint, although later released, and another had been beaten by the defendant. While not

ruling on excessiveness, the Supreme Court remanded for articulation of the considerations in sentencing pursuant to the requirements of La.C.Cr.P. art. 894.1. The Court noted that "based on the American theory and practice concurrent rather than consecutive sentences are the usual rule, at least for a defendant without previous criminal record, and in the absence of a showing that the public safety requires a longer sentence."

In State v. Palmer, 775 So. 2d 1231 (La.1 App. 1 Cir. 12/22/00), writ denied, 807 So.2d 224 (La. 1/11/02), and writ denied by State ex rel. Palmer v. State, 807 So.2d 229 (La. 1/11/02), the Court of Appeal reviewed the sixty-five year sentence imposed upon a defendant convicted of armed robbery of a convenience store. In finding the sentence was not excessive, the Court considered the evidence in the record that the defendant, who was classified as a first time felony offender, in addition to robbing the store clerk, pointed a gun at the face of one store customer and made her go to the back office, actually shot and robbed another store customer, and fired additional shots at that customer while fleeing the scene. Palmer, supra, at 1235.

In State v. Sheppard, 510 So.2d 118 (La. App. 5th Cir. 1987), a sentence of 99 years without benefit of probation parole or suspension of sentence was found not to be excessive for a first time offender who committed two armed robberies in succession, where the victims were threatened with harm, and where a police officer was shot and critically wounded trying to apprehend him.

In State v. Harrison, 446 So.2d 423 (La. App. 4th Cir. 1984), the court of appeal upheld imposition of the maximum sentence for armed robbery in the case of a 24 year old first-time offender where the defendant shot the victim in the head during the robbery and where he had 36 prior arrests.

In State v. Jones, 808 So.2d 609 (La. App. 1 Cir. 5/11/01), writ denied, 815 So.2d 93 (La. 5/3/02), the Louisiana First Circuit upheld the ninety-nine year

sentence of a sixty-two-year old defendant who was convicted of having participated in the 1973 armed robbery of an individual in his apartment. During this event, the victim's arms and legs were tied behind his back with strips of bed sheets. The victim was beaten with a blunt instrument, placed face down on the floor, and fatally shot in the back of the head. The trial court noted that the defendant was a fourth felony offender and that he had participated in the offense less than four days after his having been released from the department of corrections.

The Jones court further noted that maximum sentences may be imposed for the most serious ofenses and the worst offenders, or when offender poses an unusual risk to public safety due to his past conduct of repeated criminality. Jones, supra, at 631-614.

To suggest that Christopher Oxley falls within the category of worst offenders and that the offense committed was one of the worst offenses is not substantiated by the above review of cases.

Mr. Oxley was not the worst kind of offender. He was gainfully employed at the time of the offense, had graduated from high school, was only 24 years old, had no prior criminal record, and had no disciplinary problems in school.

Furthermore, the crime was not the worst kind of offense, when compared to other cases of armed robbery. Mr. Oxley did not wield a weapon and was never seen by the victim. The amount taken as a result ofthis robbery was only $244.82, and, perhaps most importantly, the victim, Ms. Carissa Williams, was uninjured.

Such a draconian sentence as that imposed by the trial court on Mr. Oxley, in light of his clean criminal record, the small amount taken in the robbery, the absence of injury to the alleged victim, and the lack of any stated finding that Oxley poses any future threat to

society[3], unarguably shocks the sense of justice of even the most jaded of individuals.

For these reasons, the sentence of ninety-nine years without benefit of parole or probation is clearly excessive and unconstitutional in violation of both Louisiana Constitution and Constitution of the United State of America.

III. The sentencing court failed to consider mitigating factors in imposing a sentence upon a defendant as required by Louisiana law.

At sentencing, the court sentenced the 24 year old, first offender, Christopher Oxley to the statutory maximum sentence allowable for the crime of armed robbery: ninety-nine years in custody without benefit of probation, parole, or suspension of sentence. Although mitigating factors were present, and stipulated to by the prosecution, the sentencing court gave no indication that any of these factors were considered. [R. 332 and see minutes of June 24, 2003, re-sentencing.)

Article 894.1 of the Louisiana Code of Criminal Procedure provides that a trial court **shall** state for the record the considerations taken into account and the factual basis therefor in imposing a sentence. La. C.Cr.P. Art 894.1. Even a broad restatement of the sentencing considerations does not satisfy the requirement of Paragraph C of the Article requiring that the trial court state the factual basis for its findings, or the purpose of the statute to individualize the sentence to the particular offender. State v. Jones, 386 So.2d 85 (La.1980); State v. Franks, 373 So.2d 1307 (La.1979); State v. Huntsberry, 409 So.2d 555 (La. 1982). The purpose of Article 894.1 is to afford a reviewing court some insight into the reasoning process of the sentencing judge, so that the propriety of the sentence can be better evaluated. State v. Price, 403

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[3]Any language pertaining to any alleged propensity of Oxley to pose any future threat to society is noticeably absent from the Record.

So.2d 660 (La.1981).

Where the court fails to adequately articulate the factual basis for the sentence imposed, an appellate court is unable to determine whether a sentence is excessive. In such a case, the sentence should be vacated and the case remanded for further articulation of the basis for the sentence imposed. State v. Saunders, 393 So.2d 1278 (La.1981); State v. Jackson, 360 So.2d 842 (La.1978).

Although a court need not state for the record his or her consideration of each of the aggravating and mitigating circumstances enumerated in the Article, the record must reflect that the judge did consider these guidelines in particularizing the sentence to the defendant. State v. Quebedeaux, 424 So.2d 1009 (La.1982).

The record should reflect that the trial court considered not only the seriousness of the crime and the defendant's criminal history, but also the defendant's personal history (age, mental status,dependents, family ties, employment record, emotional and physical health), and his potential for rehabilitation. State v. Quebedeaux, supra; State v. Jones, 398 So.2d 1049 (La.1981). The judge should indicate that he or she considered not only the factors militating for incarceration, but also any factor mitigating against it. State v. Ray, 423 So.2d 1116 (La.1982); State v. Quebedeaux, supra; State v. Trahan, 412 So.2d 1294, 1296 (La.1982).

In sentencing Mr. Oxley to the maximum penalty for armed robbery at the first sentencing, the court initially stated:

> After hearing all of the testimony at trial, the witnesses presented here[4], the witnesses presented, the oral arguments and motions

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[4]At the hearing addressing the defense motion for new trial and sentencing, Lance Engolio, counsel for co-defendant Gary Calligan was called by the prosecution to testify, as was Mr. Willie Bush.

> submitted subsequent to the trial, after reviewing the probable cause -- I'm sorry, the pre-sentence investigation, remembering that there were orders to kill the personnel in the station, the court feels that the sentence that is imposed will be fair and just, and it is ordered that he spend 99 years with the department of corrections, without benefit of probation, parole, or suspension of sentence. Mr. Oxley, you are given notice that you have five days for any appeal. . .[R. 332].

At the re-sentencing, as cited above at [R. 1011-1012], the court utilized the same considerations as at the first sentencing:

> You are here for sentencing because there was not a 24-hour delay prior to your sentencing after a motion had been made by your attorney; therefore, you are standing here today to be sentenced. The court is going to sentence you to 99 years at had labor, without the benefit of probation, parole or suspension of sentence. . .

In light of the fact that the sentencing court failed to articulate any that it considered any mitigating factors in imposing upon Mr. Oxley the statutory maximum penalty for his conviction, the sentencing court failed to comply with Louisiana law. Therefore, the sentence imposed must be vacated.

CONCLUSION

For the reasons set forth herein, the foregoing Petition for Certiorari should be granted.

Respectfully submitted,

By:_____
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APPENDIX

A. Writ denial by the Supreme Court of the State of Louisiana.(1/14/2004).

B. Opinion and Judgment of the First Circuit Court of Appeal for the State of Louisiana (May 9, 2003);

C. Opinion and Judgment of the First Circuit Court of Appeal for the State of Louisiana (May 14, 2004);

D. Writ Denial by the Supreme Court of the State of Louisiana.(12/19/03).

E. Louisiana Statutes

The Supreme Court of the State of Louisiana

State of Louisiana

VS.

CHRISTOPHER D. OXLEY

IN RE: Oxley, Christopher D./ - Defendant; Applying for Writ of Certiorari and/or Review, Parish of Livingston, 21st Judicial District Court Div. E., No. 14,698; to the Court of Appeal, First Circuit, No. 2003 KA 2171

January 14, 2005

Denied.

JPV
PFC
CDK
BJJ
CDT
JTK
JLW

Supreme Court of Louisiana January 14, 2005.

s/ Catherina A Fontana
Deputy Clerk of Court
For the Court

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2002 KA 1506

STATE OF LOUISIANA

VERSUS

CHRISTOPHER D. OXLEY

Judgment Rendered: May 9, 2003

appealed from the
Twenty-First Judicial District Court
in and for the Parish of Livingston, State of Louisiana
Trial Court Number 14698

Honorable Brenda Bedsole Ricks, Judge Presiding

*****

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BEFORE: CARTER, C.J., WHIPPLE AND CIACCIO[12], JJ.
Ciaccio concurs with reasons.

WHIPPLE, J.

Defendant, Christopher D. Oxley, was charged by bill of information with armed robbery, a violation of LSA-R.S. 14:64. He pled not guilty. Following a trial by jury, defendant was found guilty as charged and sentenced to imprisonment at hard labor for ninety-nine years without benefit of parole, probation, or suspension of sentence. Defendant filed a motion to reconsider the sentence, which the trial court denied. Defendant appeals, urging five assignments of error as follows:

1. The trial court erred in allowing the playing of the taped statements of [K.R.] and Calligan in the presence of the jury.
2. The prosecution failed to carry its burden of proving the defendant's guilt beyond a reasonable doubt.
3. The trial court erred in denying the defendant's motion for a new trial in light of newly discovered evidence which, despite due diligence of defense counsel, was not discovered prior to or during the trial of this matter.
4. The trial court abused its discretion in sentencing the defendant, a first time offender, whose culpability had been called into serious question in light of the newly discovered testimony of Willie Bush, to

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[1]Judge Philip C. Ciaccio, (retired), Fourth Circuit Court of Appeal, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

ninety-nine years without benefit of probation, parole, or suspension of sentence.

5. The trial court erred in failing to consider mitigating factors and failing to specify the statutory basis for sentencing Oxley to the maximum penalty for the crime for which he was convicted.

We affirm defendant's conviction, vacate the sentence, and remand to the trial court for resentencing.

FACTS

On October 5, 1999, Clarissa Williams was working the night shift at a Chevron service station on Range Road in Denham Springs, Louisiana, when two black males entered the store and requested permission to use the store's restroom. The older, shorter individual walked into the restroom and then exited the store. When the younger individual, later identified as K.R., a juvenile, returned from the restroom he told Williams thatthe toilet inside the restroom was overflowing. Williams went to inspect the restroom and noted that the toilet was functioning properly and there was no evidence of overflow. As Williams returned from the restroom, K.R. pointed a gun at her and ordered her back into the restroom. Inside the restroom, K.R. demanded that Williams remove her uniform shirt. When Williams complied, K.R. assured her that although his cousin had instructed him to kill her, he did not plan to harm her. K.R. told Williams to lock the restroom door and remain quiet inside. Williams remained inside the restroom throughout the commission of the robbery.

Meanwhile, Philcon Cox, a clerk at the Circle K convenience store across the street from Chevron, called the police and reported what he thought was suspicious activity at the Chevron. Cox told officers that he observed two individuals walking from the rear of the Chevron station and two other individuals inside the store.[2] Cox

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[2]Cox was unable to identify any of the individuals he observed.

informed the police that he found the presence of individuals inside Chevron particularly troubling because at that hour, the night clerk at Chevron customarily would lock the store and serve customers through a window.

Several officers responded to Cox's report of a potential robbery in progress. Upon arriving at Chevron, the officers observed an individual wearing a green jacket and carrying a backpack exit the store and move rapidly toward the rear of the building. Another individual was also observed exiting the store. This individual, later identified as K.R., immediately turned around and reentered the store when he saw the police. K.R. was apprehended inside the store and placed under arrest. Shortly thereafter, the defendant was discovered "crouched down in the bushes" in a wooded area behind the McDonald's restaurant adjacent to the Chevron station. The officers recognized the defendant as the individual they saw exiting the store carrying a backpack. The officers detained the defendant and searched the wooded area. The officers recovered a backpack containing propane gas welding materials under a bush in close proximity to the area where the defendant was apprehended. The officers also found a large amount of cash (four ten-dollar bills, nineteen five-dollar bills, sixty-two one-dollar bills, a roll of dimes), three individual packs of Kool cigarettes and a carton of Kool cigarettes under the bush. A .380 handgun was later found, hidden behind the trash dumpster at McDonald's. Two plastic cylinder-like tubes containing rolled currency were recovered from the defendant's pockets. The plastic tubes matched those used in the automated change bank at Chevron and contained rolled currency in denominations consistent with those used at Chevron. The defendant was arrested and charged with armed robbery.

Following his arrest, K.R. gave a taped statement, admitting his participation in the armed robbery. In the statement, K.R. admitted that he and his cousin, the defendant, robbed the Chevron station. According to K.R., the defendant, a former employee of the Chevron station,

planned the robbery and recruited K.R. and Gary Calligan to assist him in robbing the station. K.R. stated that he and Calligan rode to Denham Springs with the defendant in the defendant's girlfriend's vehicle. In route to Denham Springs, the defendant instructed K.R. and Calligan as to how the robbery would be accomplished. The defendant gave K.R. a .380 handgun and told him to enter the store, remove the videotape from the surveillance equipment and kill the clerk.[3] The defendant also instructed K.R. to remove the clerk's uniform top. The defendant explained that he was going to remain outside until K.R. and/or Calligan alerted him that the clerk was dead and it was clear to enter. K.R. explained that the defendant was afraid that, as a former employee of the store, he would be easily identifiable. After receiving the signal, the defendant would enter the store and the three individuals would complete the robbery. The defendant planned to outfit himself in Williams's uniform top and pretend he was still employed at Chevron. He would then steal the money from the cash register and use the propane welding equipment to open the store's safe to get more cash.

According to K.R., he and Calligan were dropped off at the store as planned, while the defendant remained in the car. K.R. stated that although Calligan initially agreed to participate in the robbery, after he used the restroom, Calligan exited the store and did not return. K.R. indicated that, despite Calligan's departure, he and the defendant proceeded with the robbery. Once K.R. locked Williams inside the restroom, he located the surveillance equipment and ejected the videotape. K.R. then beckoned for the defendant to enter the store. K.R. stated that he gave the gun to the defendant once he entered the store. K.R. also stated he simply continued as a lookout, while the defendant removed all of the money from the cash register. The defendant also retrieved several plastic

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[3] Early in his statement, K.R. denied being armed with a weapon. However, in later portion of the statement, K.R. admitted that during the commission of the robbery, he was armed with a handgun provided by the defendant.

cylinders containing rolled currency from the store's automated change machine located behind the cashier's counter. The plan to use the welding equipment to open the safe never materialized because the police arrived upon the scene.

K.R. stated that, as he and the defendant prepared to exit the store, they noticed that the police had arrived on the scene. The defendant continued out of the door with the gun and a backpack, while K.R. turned around and went back into the store and entered the restroom. Inside the restroom, K.R. placed the videotape inside the back of the toilet.

SUFFICIENCY OF THE EVIDENCE

In cases such as this one, where the defendant has raised issues on appeal both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court preliminarily determines the sufficiency of the evidence before discussing the other issues raised on appeal. State v. Hearold, 603 So. 2d 731, 734 (La. 1992). The sufficiency issue must be decided first because a finding of insufficient evidence to support the guilty verdict bars the retrial of a defendant based on the constitutional protection against double jeopardy. Thus, all other issues would be rendered moot. State v. Davis, 2001-3033, pp. 2-3 (La. App. 1st Cir. 6/21/02), 822 So. 2d 161, 163. Accordingly, we will first address the defendant's second assignment of error, which challenges the sufficiency of the state's evidence.

The defendant contends the "uncorroborated and self-serving testimony of co-arrestees" was insufficient to meet the state's burden of proving his guilt beyond a reasonable doubt.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, when viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude the state proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. See LSA-C.Cr.P. art. 821; State v. Booker, 2002-1269 p. 3-4 (La. App. 1st Cir.

2/14/03), 839 So. 2d 455, 458. The Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), standard of review incorporated in LSA-C.Cr.P. art. 821 is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides the fact-finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. State v. Nevers, 621 So. 2d 1108, 1116 (La. App. 1st Cir.), writ denied, 617 So. 2d 906 (La. 1993); State v. McLean, 525 So. 2d 1251, 1255 (La. App. 1st Cir.), writ denied, 532 So. 2d 130 (La. 1988).

Armed robbery is defined as "the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, *by* use of force or intimidation, while armed with a dangerous weapon." LSA-R.S. 14:64(A). Encompassed in proving the elements of an offense is the necessity of proving the identity of the defendant as the perpetrator. When identification is the key issue in the case, the state is required to negate any reasonable probability of misidentification in order to carry its burden. State v. Davis, 2001-3033, p. 3 (La. App. 1st Cir. 6/21/02), 822 So. 2d 161, 163. Positive identification by only one witness may be sufficient to support the defendant's conviction. State v. Eames, 97-0767, p. 6 (La. App. 1st Cir. 5/15/98), 714 So. 2d 210, 215, writ denied, 98-1640 (La. 11/6/98), 726 So. 2d 922.

At trial, Williams testified that on the night in question, two individuals entered the store together and asked to use the restroom. After using the restroom, the older individual walked out of the store while the younger one, whom Williams later identified as K.R., forced her into the restroom at gunpoint and told her to remove her shirt. K.R. told Williams that although his cousin had instructed him to kill her, he did not plan to harm her.

Williams stated that she remained locked inside the restroom throughout the commission of the robbery. K.R. returned to the restroom several times. Once he asked Williams for the keys to lock the store. The next time he

asked where the surveillance equipment was located. Finally, K.R. returned with the surveillance videotape and informed Williams that the police had arrived at the store. He asked Williams to hide the tape inside her clothing. When Williams refused, K.R. placed the tape inside the back of the toilet. K.R. surrendered to the officers and Williams exited the restroom.

Williams further testified that, shortly thereafter, investigating officers presented the defendant for identification. She indicated that while she recognized the defendant as a former Chevron employee, she was unable to identify him as a participant in the robbery. She did not recall seeing the defendant inside the Chevron station that night.

Detective Ken Simmons of the Denham Springs Police Department testified that he responded to the report of a robbery at the Chevron Station. He stated that as he approached the Chevron parking lot, he saw an individual exit the store and walk toward the side of the building. He also saw another individual inside the store. According to his testimony, upon noticing the police vehicles, K.R., who had been walking toward the exit door, turned around, reentered the store and walked toward the area where the restroom was located. Det. Simmons then instructed Corporal Tommy Delrie, another Denham Springs Police Department officer who arrived on the scene, to pursue the individual headed behind the building. Detectives Simmons and Womack entered the store. Det. Womack secured and detained K.R.

Corporal Delrie testified that upon arriving on the scene, he noticed two black males exiting the Chevron. One blak male, carrying a backpack, came through the doors, looked at Cpl. Delrie and continued east and then south behind the store. The second black male turned around and reentered the store. Cpl. Delrie pursued the individual who went behind the store. Behind the store, Cpl. Delrie lost contact with the individual he was pursuing. Cpl. Delrie testified that the individual he observed exiting the Chevron with the backpack was the defendant.

Corporal Delrie further testified that in examining the wooded area behind the McDonald's, he recovered the backpack the defendant had been seen wearing, along with a large amount of cash and some Kool cigarettes.

Sergeant Shannon Womack of the Denham Springs Police Department testified that he also responded to the robbery report. Like Cpl. Delrie and Det. Simmons, Sgt. Womack saw a black male wearing a dark green jacket and carrying a backpack exit the store. He also observed another individual inside the store. After assisting Det. Simmons in detaining K.R. inside the store, Sgt. Womack accompanied Det. Britt Jones, also of the Denham Springs Police Department, to the area behind a nearby McDonald's to search for the other individual seen leaving the store. Officer Jones testified that he found the defendant "crouched down in the bushes" in a wooded area behind McDonald's. Det. Jones and Sgt. Womack detained the defendant. Sgt. Womack searched the defendant for weapons while Det. Jones searched the area for evidence. Sgt. Womack recovered two clear, plastic tubes containing cash inside the pockets of the green jacket the defendant wore. Det. Jones also saw a backpack and a large amount of cash on the ground near the area where the defendant was apprehended. This evidence was subsequently recovered by Cpl. Delrie. During his trial testimony, Det. Jones identified the defendant in open court as the individual arrested in the wooded area behind McDonald's. Sgt. Womack likewise identified the defendant as the individual he observed leaving the Chevron wearing a green jacket and carrying a backpack.

Lieutenant Scott Jones of the Denham Springs Police Department testified that he was in charge of the follow-up investigation of the armed robbery at the Chevron. Lt. Jones testified that in connection with his investigation, he secured a taped statement from K.R., in the presence of his mother, at the Denham Springs Police Department. Lt. Jones also testified that in a subsequent search of the area near the place where the defendant was arrested, he recovered a .380 handgun hidden behind a

dumpster.

Lieutenant Jones further testified that upon speaking with the defendant regarding the robbery, the defendant stated that he was urinating behind McDonald's and knew nothing about a robbery. He stated that he had come to Denham Springs with K.R. The defendant denied knowing Calligan. As explanation for the propane bottles found in his possession, Lt. Jones testified that the defendant told him that he was a good welder.

Officer Lynn Conner, an evidence officer and crime scene technician for the Denham Springs Police Department, also testified at trial. Officer Connor was dispatched to Chevron to process the crime scene. On the scene, Officer Connor photographed the store and dusted for fingerprints. No prints were recovered. Officer Connor also photographed the firearm found behind the dumpster. Officer Connor testified that in connection with an inventory search of the defendant's vehicle after it was impounded, she recovered a small propane tank and four .380 rounds of ammunition.

After viewing the evidence in the light most favorable to the state, we find the evidence sufficient to support a finding that the defendant planned and participated in the armed robbery of Chevron. The taped statements and trial testimony of K.R. and Calligan established that the defendant masterminded the plan to rob his former place of employment and assisted in executing it. Each of the co-perpetrators stated to police, and again under oath at trial, that the defendant provided the weapon and instructed them to enter the store, kill the clerk, remove the videotape, and alert him when the store was clear to enter. K.R.'s testimony that Calligan left the store prior to the actual robbery and never returned was corroborated by the testimony ofthe store clerk. The clerk testified that the older individual (Calligan) walked out of the store immediately after using the restroom. From the time he was initially questioned by the police, K.R. admitted his involvement in the robbery, and initially and consistently identified the defendant as

the individual who entered the store with the backpack and assisted in the commission of the robbery. K.R. never wavered in his implication of the defendant as a participant. Although the clerk, who had been locked in the restroom during the commission of the robbery, was unable to identify the defendant as a participant, the trial testimony of several investigating officers placed the defendant at the crime scene, exiting the Chevron immediately following the robbery. The officers positively identified the defendant as the black male they observed leaving the store wearing a green jacket and carrying a backpack. The officers' testimony and the evidence presented at trial established that the defendant was found hiding in the bushes in a nearby area, clad in a green jacket and carrying a backpack. Inside the jacket the defendant was wearing, officers found evidence directly connecting the defendant with the robbery.

Considering the aforementioned evidence, we find that the state met its burden of proving all of the necessary elements of armed robbery. Any rational trier of fact could have found the evidence sufficient to prove the defendant's guilt beyond a reasonable doubt. Furthermore, the overwhelming evidence presented by the state connecting the defendant with the robbery negated any possibility of misidentification. This assignment of error lacks merit.

INTRODUCTION OF PRIOR INCONSISTENT STATEMENTS

In his first assignment of error, defendant contends the trial court erred in allowing the state to introduce into evidence the taped statements of K.R. and Gary Calligan. Specifically, defendant contends that the statements did not serve to rebut any prior statements by K.R. and Calligan, were highly prejudicial, and served to unduly incite the jury. The defendant further argues that introduction of the statements, wherein K.R. and Calligan indicated that the defendant planned the armed robbery and ordered them to kill the clerk, constituted introduction of other crimes evidence. In response, the state argues that the statements made by K.R. and

Calligan were admissible pursuant to LSA-C.E. art. 801(D)(l)(b) which provides in pertinent part, as follows:

> **D. Statements which are not hearsay.** A statement is not hearsay if:
>
> **(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
>
> * * * *
>
> (b) Consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication orimproper influence or motive[.]

Upon reviewing the transcripts of the taped statements, setting forth the circumstances of the robbery, we find that the statements, in general, were materially consistent with the properly-admitted trial testimony of K.R. and Calligan. In his statement to police and at trial, K.R. admitted his participation in the robbery and identified the defendant as the mastermind behind the plan and the individual who actually assisted in committing the robbery. K.R. consistently stated to the police and at trial that, although Calligan initially entered the store with him, Calligan did not participate in the robbery. In his statement and trial testimony, Calligan also indicated that the defendant planned the robbery. Calligan admitted that he participated in the planning and originally agreed to participate in the robbery, but he changed his mind after entering the store. Calligan left the store and walked from Denham Springs back to Baton Rouge.

At trial, the defendant took the stand and testified on his own behalf. He expressly stated that K.R. and Calligan were fabricating their versions of the events. The defendant denied any participation in the planning or the commission of the robbery. He further accused the investigating officers of lying.

Considering the defendant's allegation of fabrication on the part of K.R. and Calligan, we find that under LSA-C.E. art. 801(D)(l)(b), allowing the jury to hear their taped statements given to officers shortly after the

incident in question was not error. The statements were prior statements by the witnesses who testified at trial and were subjected to cross-examination. As previously noted, the statements were generally consistent with the trial testimony of the witnesses and were offered to rebut the defendant's express charge of witness fabrication. See LSA-C.E. art. 801(D)(l)(b). Thus, we find no error in the trial court allowing the statements to be admitted into evidence and played for the jury. This assignment of error lacks merit.

DENIAL OF MOTION FOR NEW TRIAL NEWLY DISCOVERED EVIDENCE

In his third assignment of error, the defendant contends the trial court erred in denying his motion for new trial despite the newly discovered evidence that he did not commit the armed robbery. The defendant relies on the testimony of his uncle, Willie Bush, presented at a hearing on the motion for new trial, concerning an alleged statement made by K.R. exonerating the defendant. Bush testified that in a conversation he had with K.R. a few days after the defendant's trial, K.R. stated that the defendant did not participate in the robbery. According to Bush, K.R. stated that he and Calligan planned and carried out the robbery because K.R.'s mother needed the money. Bush claimed K.R. also told him that the defendant was not present and did not participate in the robbery. Bush stated that K.R. indicated that he and Calligan "put everything on [the defendant]" because the defendant "ratted" on them.

The trial court denied the defendant's motion for new trial.

Louisiana Code of Criminal Procedure article 851 provides, in pertinent part:

> The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded. The court, on moton of the defendant, shall grant a new trial whenever:

* * *

> (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty[.]

In order to obtain a new trial based on newly discovered evidence, the defendant has the burden of showing (1) the new evidence was discovered after trial, (2) the failure to discover the evidence at the time of trial was not caused by lack of diligence, (3) the evidence is material to the issues at trial, and (4) the evidence is of such a nature that it probably would have produced a different verdict. State v. Smith, 96-0961, p. 7 (La. App. 1st Cir. 6/20/97), 697 So. 2d 39, 43. In evaluating whether or not the newly discovered evidence warrants a new trial, the test to be employed is not simply whether another trier of fact might render a different verdict, but whether the new evidence is so material that it should produce a verdict different from that rendered at trial. State v. Henderson, 99-1945, p. 15 (La. App. 1st Cir. 6/23/00), 762 So. 2d 747, 758, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235. The trial court's denial of a motion for new trial will not be disturbed absent a clear abuse of discretion. State v. Maize, 94-0736, pp. 27-28 (La. App. 1st Cir. 5/5/95), 655 So. 2d 500, 517, writ denied, 95-1894 (La. 12/15/95), 664 So. 2d 451.

After a careful review of the record, we do not find thatdefendant has met the requisites for the granting of a motion for new trial based upon newly discovered evidence. While Bush's testimony regarding the statement allegedly made after the defendant's trial was clearly not discoverable before or during trial, we find no merit in the defendant's argument that this uncorroborated claim by the defendant's uncle would have produced a different verdict in this case. Although Williams could not identify the defendant as a participant in the robbery because she

had been locked away in the restroom, several officers unequivocally testified that the person they saw leaving the Chevron immediately after the robbery was the defendant. Also, the defendant was arrested in the area near the robbery with plastic tubes from the automated change machine in his pockets. Given this direct evidence linking the defendant to the robbery, we are unable to conclude that Bush's uncorroborated testimony claiming that K.R. allegedly indicated that the defendant never entered the Chevron was of such a nature that it probably would have produced a different verdict or would change the jury's verdict. Therefore, given the evidence presented and considering the nature of the claim asserted in Bush's testimony, we find no abuse of discretion in the trial court's denial of defendant's motion for new trial. This assignment of error is meritless.

PATENT SENTENCING ERROR

In reviewing the record for patent error, we have discovered the trial court failed to comply with LSA-C.Cr.P. art. 873, which requires a minimum delay of twenty-four hours between the denial of a motion for new trial and the imposition of sentence. The transcript does not reflect that the defendant waived this sentencing delay. In State v. Augustine, 555 So. 2d 1331, 1333-1334 (La. 1990), the Louisiana Supreme Court held that a trial court's failure to observe the twenty-four hour delay is not harmless error if the defendant challenges the sentence on appeal. Accordingly, we must vacate the defendant's sentence and remand the case to the trial court for re-sentencing. See State v. Denham, 2001-0400, p. 5 (La. App. 1st. Cir. 12/28/01), 804 So.2d 929, 932, writ denied, 2002-0393 (La. ½4/03), 836 So.2d 37. Thus, we pretermit consideration of assignments of error numbers four and five, which raise the issue of excessiveness of the sentence.

For the foregoing reasons, defendant's conviction is affirmed. The sentence is vacated and the matter is remanded to the trial court for resentencing.

CONVICTION AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING.

COURT OF APPEAL
FIRST CIRCUIT STATE OF LOUISIANA
2002 KA 1506
STATE OF LOUISIANA
VERSUS
CHRISTOPHER D. OXLEY

CIACCIO, PHILIP C, CONCURS AND ASSIGNS REASONS.

The admission of taped statements of the witnesses, K. R. and Gary Calligan, at the close of the state's case was clearly error. The objection lodged by the defendant's counsel that the statements were inadmissible hearsay was correct and should have been maintained. I know of no rule of evidence that permits the prosecution to offer the earlier, unsworn statement of a witness to be introduced to buttress the witnesses' testimony in order to support the witnesses' credibility in the eyes of the jury. The reference to other crimes in the taped statement was clearly inadmissible. It is only because the inadmissible testimony had been introduced, without objection, during the testimony of the two witnesses on their direct and cross examination, am I able to conclude thatthe admission of the statement is not reversible error. However, I believe that the reference to the other crime, i.e., the direction to murder the store employee, was highly prejudicial and served to inflame not only the jury but also the trial judge as evidenced by the draconian life imprisonment sentence imposed upon a first time offender. I respectfully concur.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2003 KA 2171

STATE OF LOUISIANA

VERSUS

CHRISTOPHER D. OXLEY

Judgment rendered May 14, 2004.

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Appealed from the
21st District Court
in and for the Parish Of Livingston, Louisiana
Trial Court No. 14, 698
Honorable Brenda Bedsole Ricks, Judge

******

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APPELLANT
CHRISTOPHER D. OXLEY

******

BEFORE: PETTIGREW, DOWNING, AND MCCLENDON, JJ.

PETTIGREW, J.

Defendant, Christopher Oxley, was charged by of bill information with armed robbery, a violation of La. R.S. 14:64. He pled not guilty. Following a trial by jury, defendant was found guilty as charged and sentenced to imprisonment at hard labor for ninety-nine years without the benefit of parole, probation, or suspension of sentence. Defendant appealed. On May 9, 2003, this court, in an unpublished opinion, affirmed defendant's conviction, vacated the sentence, and remanded for re-sentencing. **State v. Oxley**, 2002-1506 (La. App. 1 Cir. 5/9/03), 844 So. 2d 420, writs denied, 2003-1662, 2003-1927 (La. 12/19/03), 861 So. 2d 553, 559. On remand, the trial court resentenced defendant to imprisonment at hard labor for ninety-nine years without the benefit of parole, probation, or suspension of sentence. Defendant again appeals, challenging his sentence as excessive. Finding no merit in the assigned errors, we affirm defendant's sentence, we affirm defendant's sentence.

FACTS

In the prior appeal, the facts of this case were summarized as follows:

On October 5, 1999, Clarissa Williams was working the night shift at a Chevron service station on Range Road in Denham Springs, Louisiana, when two black males entered the store and requested permission to use the store's restroom. The older, shorter individual walked into the restroom and then exited the store. When the younger individual, later identified as K.R., a juvenile, returned from the restroom he told Williams that the toilet inside the room was overflowing. Williams went to inspect the restroom and noted that the toilet was functioning

properly and there was no evidence of overflow. As Williams returned from restroom, K.R. pointed a gun at her and ordered her back into the restroom. Inside the restroom, K.R. demanded that Williams remove her uniform shirt. When Williams complied, K.R. assured that although his cousin had instructed him to kill her, he did not plan to harm her. K.R. told Williams to lock the restroom door and remain quiet inside. Williams remained inside the restroom throughout the commission of the robbery.

Meanwhile, Philcon Cox, a clerk at the Circle K convenience store across the street from Chevron, called the police and reported what he thought was suspicious activity at the Chevron. Cox told officers that he observed two individuals

walking form the rear of the Chevron station and two other individuals inside the store. Cox informed the police that he found the presence of individuals inside Chevron particularly troubling because at that hour, the night clerk at Chevron customarily would lock the store and serve customers through a window.

Several officers responded to Cox's report of a potential robbery in progress. Upon arriving at Chevron, the officers observed an individual wearing a green jacket and carrying a backpack exit the store and move rapidly toward the rear of the building. Another individual was also observed exiting the store. This individual, later identified as K.R., immediately turned around and reentered the store when he saw the police. K.R. was apprehended inside the store and placed under arrest. Shortly thereafter, the defendant was discovered "crouched down in the bushes" in a wooded area behind the McDonald's restaurant adjacent to the Chevron station. The officers recognized the defendant as the individual they saw exiting the store carrying a backpack. The officers detained the defendant and searched the wooded area. The officers recovered a backpack containing propane gas welding materials under a bush in close proximity to the area where the defendant was

apprehended. The officers also found a large amount of cash (four ten-dollar bills, nineteen five-dollar bills, sixty-two one-dollar bills, a roll of dimes), three individual packs of Kool cigarettes and a carton of Kool cigarettes under the bush. A .380 handgun was later found, hidden behind the trash dumpster at McDonald's. Two plastic cylinder-like tubes containing rolled currency were recovered from the defendant's pockets. The plastic tubes matched those used in the automated change bank at Chevron and contained rolled currency in denominations consistent with those used at Chevron. The defendant was arrested and charged with armed robbery.

Following his arrest, K.R. gave a taped statement, admitting his participation in the armed robbery. In the statement, K.R. admitted that he and his cousin, the defendant, robbed the Chevron station. According to K.R., the defendant, a former employee of the Chevron station, planned the robbery and recruited K.R. and Gary Calligan to assist him in robbing the station. K.R. stated that he and Calligan rode to Denham Springs with the defendant in the defendant's girlfriend's vehicle. In route to Denham Springs, the defendant instructed K.R. and Calligan as to how the robbery would be accomplished. The defendant gave K.R. a .380 handgun and told him to enter the store, remove the videotape from the surveillance equipment and kill the clerk. The

defendant also instructed K.R. to remove the clerk's uniform top. The defendant explained that he was going to remain outside until K.R. and/or Calligan alerted him that the clerk was dead and it was clear to enter. K.R. explained that the defendant was afraid that, as a former employee of the store, he would be easily identifiable. After receiving the signal, the defendant would enter the store and the three individuals would complete the robbery. The defendant planned to outfit himself in William's uniform top and pretend he wasstill employed at Chevron. He would then steal the money from the cash register and use the propane welding equipment to open the store's safe to get more cash.

According to K.R., he and Calligan were dropped off at the store as planned, while the defendant remained in the car. K.R. stated that although Calligan initially agreed to participate in the robbery, after he used the restroom, Calligan exited the store and did not return. K.R. indicated that, despite Calligan's departure, he and the defendant proceeded with the robbery. Once K.R. locked Williams inside the restroom, he located the surveillance equipment and ejected the videotape. K.R. then beckoned for the defendant to enter the store. K.R. stated that he gave the gun to the defendant once he entered the store. K.R. stated he simply continued as a lookout, while the defendant removed all of the money from the cash register. The defendant also retrieved several plastic cylinders containing rolled currency from the store's automated change machine located behind the cashier's counter. The plan to use the welding equipment to open the safe never materialized because the police arrived upon the scene.

K.R. stated that, as he and the defendant prepared to exit the store, they noticed that the police had arrived on the scene. The defendant continued out of the door with the gun and a backpack, while K.R. turned around and went back into the store and entered the restroom. Inside the restroom, K.R. placed the videotape inside the back of the toilet. [Footnotes omitted.]

OXLEY, 2002-1506 at 2-5.

EXCESSIVE SENTENCE

In three assignments of error, defendant contends the trial court erred in imposing an excessive sentence. He argues that the court sentenced him for crimes for which he was not convicted, the trial court failed to consider mitigating factors, the offense was not the most serious offense, and he was not the most serious offender.

Louisiana Code Of Criminal Procedure Article 894.1

The Louisiana Code Of Criminal Procedure sets forth items that must be

considered by the trial court before imposing sentence. La. Code Crim. P. art. 894.1. The trial court need not

recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. **State v. Herrin**, 562 So. 2d 1, 11 (La. App. 1 Cir.), writ denied, 565 So. 2d 942(La. 1990). In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. **State v. Watkins**, 532 So. 2d 1182, 1186 (La. App. 1 Cir. 1988).

Constitutional Excessiveness

Article I, Section 20, of the Louisiana Constitution of 1974 prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. **State v. Sepulvado**, 367 So. 2d 762, 767 (La. 1979). Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. **State v. Reed**, 409 So. 2d 266, 267 (La. 1982). A trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Lanclos,** 419 So.2d 475, 478 (La. 1982). Maximum sentences are generally reserved for cases involving the most serious offenses and the worst offenders. **State v. Mance**, 2000-1903, p.4 (La. App. 1 Cir. 5/11/01), 797 So. 2d 718, 721.

Whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than ten years and for not more than ninety-nine years, without the benefit or parole, probation, or suspension of sentence. La. R.S. 14:64 (B). Defendant was sentenced to ninety-nine years at hard labor without the benefit of parole, probation, or suspension of sentence. In resentencing defendant, the trial court stated:

> And the court is going to designate this as a crime of violence and assigns such reasons all of the testimony that was adduced at the trial, including the testimony of the victim who said that she would have been murdered, but for the fact of her race. One of the defendants was sixteen at the time of the testimony, and said that he was instructed to kill the individual who was working in there. And his statement, as I recall it, from the stand was that he didn't kill his own kind. But for that,
>
> **5.**
>
> there would have been a death sentence associated with this, not just an armed robbery. Because of the particular nature of all the crime, because of the fact there would have been a death associated with this, because he was, in fact, the mastermind of this, the court is going to designate this as a crime of violence and does impose the 99 year sentence.

Our review of the record in this case reveals no manifest abuse of discretion in the trial court's imposition of sentence. The sentence is not excessive and does not violate Article 894.1.

Defendant's argument that the trial court erred in considering, in reasons for sentence, that defendant instructed K.R. to murder the store clerk lacks merit. As previously noted, Article 894.1 of the Code Of Criminal Procedure sets forth numerous items to be considered by the trial court in imposing sentence. The aggravating sentencing factors of Article 894.1 primarily relate to the facts and circumstances surrounding the commission of the offense. These factors allow the sentencing court to consider, among other things, whether the offender used threats of, or actual violence, whether the offender used a dangerous weapon, the extent of the offender's participation in the commission of the offense, and any other relevant aggravating circumstances. La. Code Crim.

P. art. 894. 1 (B) (6), B (10), B(13), and B (21). Thus, we find no error in the trial court's consideration of the relevant facts and circumstances of the instant offense in sentencing defendant. The record reflects defendant was sentenced for armed robbery; he was not sentenced for attempted murder and/or conspiracy to commit murder. The court, in its reasons, merely considered the intended killing of the victim as an aggravating circumstance of the armed robbery offense.

Defendant's contention that the trial court failed to give adequate weight to the mitigating circumstances also lacks merit. At the commencement of the resentencing hearing, counsel for the defendant presented several mitigating factors to the court. Counsel advised the court that the defendant had no prior criminal history other than

the instant offense and that he was never considered a behavioral problem in school. Defense counsel also noted that less than three hundred dollars was taken during the robbery. The State stipulated to each of the aforementioned mitigating factors. Thus, the record clearly indicates that the court was aware of the relevant mitigating factors set forth by the defense in its brief before this court. Although the trial court may not have articulated every aggravating and mitigating factor, the trial court's reasons for sentence adequately demonstrate compliance with Article 894.1. Furthermore, there is no requirement that any specific mitigating factors be given any particular weight by the sentencing court. **State v. Dunn**, 30,767, p.2 (La. App. 2 Cir. 6/24/98), 715 So.2d 641,643.

Finally, the sentence imposed was not grossly disproportionate to the severity of the offense, and thus, was not unconstitutionally excessive.

A presentence investigation report (PSI) ordered by the trial court indicated that although defendant was officially a first felony offender, he "represents the worst of today's young violent predators." This finding was based upon the fact that defendant masterminded the armed

robbery plans and callously ordered K.R., a juvenile, to murder the victim during offense. Moreover, defendant repeatedly failed to take responsibility for his actions, even after his accomplices confessed. The PSI recommended imposition of the maximum sentence allowed by law on this armed robbery offense.

In its reasons for sentence, the trial court considered the dangerous nature of the crime, defendant's calculated and detailed planning of the offense, and the fact that but for K.R.'s decision to disobey defendant's specific instructions, there would have been a death associated with this armed robbery. The court followed the recommendation in the PSI and imposed the maximum sentence of ninety-nine years.

Considering the reasons for sentence provided by the trial court and the entire record before us, we do not find the sentence imposed in this case to be excessive. By recruiting a minor to assist in committing the extremely violent and serious offense of armed robbery, and specifically instructing the minor to commit murder, defendant demonstrated he is extremely dangerous and exercises absolutely no restraint in obtaining what he wants. Furthermore, as noted by the trial court, defendant has not yet accepted responsibility or showed any remorse for his actions. Thus, we find, even in the absence of any significant

criminal history, defendant has unequivocally shown that he is one of the worst type of criminal predators. We further find that the instant offense, which was premeditated and included specific instructions to kill, represents one of the most serious types of armed robbery offenses, even through the victim suffered no actual physical harm. Therefore, under these circumstances, we find no error or abuse of discretion in the trial court's imposition of the maximum sentence in this case. The trial court duly considered the mitigating and aggravating factors and found that this defendant was deserving of the maximum sentence of ninety-nine years. Our sense of justice is not shocked by this sentence, and the sentence

is adequately supported by the record.

CONCLUSION

For the above and foregoing reasons, defendant's sentence is affirmed.

SENTENCE AFFIRMED.

STATE OF LOUISIANA
Versus
CHRISTOPHER D. OXLEY
NUMBER 2003 CA 2171
FIRST CIRCUIT COURT OF APPEAL
DOWNING, J., DISSENTS AND ASSIGNS REASONS

DOWNING, J.

I dissent. If defendant had been tried for conspiracy to commit first-degree murder, his maximum sentence would have been thirty years. La. R.S. 14:26B. If he had been tried for attempted first-degree murder, his exposure would have been not less than ten nor more than fifty years without benefit of parole, probation, or suspension of sentence. La. R.S. 27 (D) (1) (a). Accordingly, I would find the defendant's sentence of ninety-nine years without benefit of parole, probation, or suspension of sentence for being a principal to armed robbery to be excessive.

861 So.2d 553, 2003-1622 (La. 12/19/03)

Supreme Court of Louisiana.
STATE of Louisiana
v.
Christopher OXLEY.
No. 2003-K-1622.
Dec. 19, 2003

In re Oxley, Christopher D.;--Defendant; Applying for Writ of Certiorari and/or Review, Parish of Livingston, 21st Judicial District Court Div. E, No. 14,698; to the Court of Appeal, First Circuit, No. 2002 KA 1506.
Denied.
La. 2003.

State v. Oxley
861 So.2d 553, 2003-1622 (La. 12/19/03)
END OF DOCUMENT

La. Const. Article I§20

No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment. Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense

La. R. S. 14:26. Criminal conspiracy

A. Criminal conspiracy is the agreement or combination of two or more persons for the specific purpose of committing any crime; provided that an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or combination. If the intended basic crime has been consummated, the conspirators may be tried for either the conspiracy or the completed offense, and a conviction for one shall not bar prosecution for the other.

B. Whoever is a party to a criminal conspiracy to commit any crime shall be fined or imprisoned, or both, in the same manner as for the offense contemplated by the conspirators; provided, however, whoever is a party to a criminal conspiracy to commit a crime punishable by death or life imprisonment shall be imprisoned at hard labor for not more than thirty years.

C. Whoever is a party to a criminal conspiracy to commit any other crime shall be fined or imprisoned, or both, in the same manner as for the offense contemplated by the conspirators; but such fine or imprisonment shall not exceed one-half of the largest fine, or one-half the longest term of imprisonment prescribed for such offense, or both.

La. R.S. 14: 27. Attempt; penalties; attempt on peace officer; enhanced penalties

A. Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would

have actually accomplished his purpose.

B. (1) Mere preparation to commit a crime shall not be sufficient to constitute an attempt; but lying in wait with a dangerous weapon with the intent to commit a crime, or searching for the intended victim with a dangerous weapon with the intent to commit a crime, shall be sufficient to constitute an attempt to commit the offense intended.

(2) Further, the placing of any combustible or explosive substance in or near any structure, watercraft, movable, or forestland, with the specific intent eventually to set fire to or to damage by explosive substance such structure, watercraft, movable, or forestland, shall be sufficient to constitute an attempt to commit the crime of arson as defined in R.S. 14:51 through 53.

C. An attempt is a separate but lesser grade of the intended crime; and any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt.

D. Whoever attempts to commit any crime shall be punished as follows:

(1)(a) If the offense so attempted is punishable by death or life imprisonment, he shall be imprisoned at hard labor for not less than ten nor more than fifty years without benefit of parole, probation, or suspension of sentence.

(b) If the offense so attempted is punishable by death or life imprisonment and is attempted against an individual who is a peace officer engaged in the performance of his lawful duty, he shall be imprisoned at hard labor for not less than twenty nor more than fifty years without benefit of parole, probation, or suspension of sentence.

(2) If the offense so attempted is theft or receiving stolen things, and is not punishable as a felony, he shall be fined not more than two hundred dollars, or imprisoned for not more than six months, or both. If the offense so attempted is receiving stolen things, and is punishable as a felony, he shall be fined not more than two hundred dollars, or imprisoned not more than one year, or both. If the offense so attempted is theft, and is punishable as a felony, he

shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both;
(3) In all other cases he shall be fined or imprisoned or both, in the same manner as for the offense attempted; such fine or imprisonment shall not exceed one-half of the largest fine, or one-half of the longest term of imprisonment prescribed for the offense so attempted, or both.
E. For the purposes of Subsection D of this Section, the term "peace officer" means any peace officer, as defined in R.S. 40:2402.

La. R. S. 14: 28.1. Solicitation for murder
A. Solicitation for murder is the intentional solicitation by one person of another to commit or cause to be committed a first or second degree murder.
B. Whoever commits the crime of solicitation for murder shall be imprisoned at hard labor for not less than five years nor more than twenty years.

La. R.S. 14:64
Armed robbery
A. Armed robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.
B. Whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than ten years and for not more than ninety-nine years, without benefit of parole, probation, or suspension of sentence.

La. C.Cr.P. art. 873. Delay between conviction and sentence
If a defendant is convicted of a felony, at least three days shall elapse between conviction and sentence. If a motion for a new trial, or in arrest of judgment, is filed, sentence shall not be imposed until at least twenty-four hours after the motion is overruled. If the defendant expressly waives a delay provided for in this article or pleads guilty, sentence may be imposed immediately.

La. C.Cr. P. Art. 894.1. Sentencing guidelines; generally

A. When a defendant has been convicted of a felony or misdemeanor, the court should impose a sentence of imprisonment if any of the following occurs:

(1) There is an undue risk that during the period of a suspended sentence or probation the defendant will commit another crime.

(2) The defendant is in need of correctional treatment or a custodial environment that can be provided most effectively by his commitment to an institution.

(3) A lesser sentence will deprecate the seriousness of the defendant's crime.

B. The following grounds, while not controlling the discretion of the court, shall be accorded weight in its determination of suspension of sentence or probation:

(1) The offender's conduct during the commission of the offense manifested deliberate cruelty to the victim.

(2) The offender knew or should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health.

(3) The offender offered or has been offered or has given or received anything of value for the commission of the offense.

(4) The offender used his or her position or status to facilitate the commission of the offense.

(5) The offender knowingly created a risk of death or great bodily harm to more than one person.

(6) The offender used threats of or actual violence in the commission of the offense.

(7) Subsequent to the offense, the offender used or caused others to use violence, force, or threats with the intent to influence the institution, conduct, or outcome of the criminal proceedings.

(8) The offender committed the offense in order to facilitate or conceal the commission of another offense.

(9) The offense resulted in a significant permanent injury or significant economic loss to the victim or his family.

(10) The offender used a dangerous weapon in the

commission of the offense.
(11) The offense involved multiple victims or incidents for which separate sentences have not been imposed.
(12) The offender was persistently involved in similar offenses not already considered as criminal history or as a part of a multiple offender adjudication.
(13) The offender was a leader or his violation was in concert with one or more other persons with respect to whom the offender occupied a position of organizer, a supervisory position, or any other position of management.
(14) The offense was a major economic offense.
(15) The offense was a controlled dangerous substance offense and the offender obtained substantial income or resources from ongoing drug activities.
(16) The offense was a controlled dangerous substance offense in which the offender involved juveniles in the trafficking or distribution of drugs.
(17) The offender committed the offense in furtherance of a terrorist action.
(18) The offender foreseeably endangered human life by discharging a firearm during the commission of an offense which has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and which, by its very nature, involves a substantial risk that physical force may be used in the course of committing the offense.
(19) The offender used a firearm or other dangerous weapon while committing or attempting to commit an offense which has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and which by its very nature, involves a substantial risk that physical force may be used in the course of committing the offense.
(20) The offender used a firearm or other dangerous weapon while committing or attempting to commit a controlled dangerous substance offense.
(21) Any other relevant aggravating circumstances.
(22) The defendant's criminal conduct neither caused nor threatened serious harm.
(23) The defendant did not contemplate that his criminal

conduct would cause or threaten serious harm.
(24) The defendant acted under strong provocation.
(25) There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense.
(26) The victim of the defendant's criminal conduct induced or facilitated its commission.
(27) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained.
(28) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the instant crime.
(29) The defendant's criminal conduct was the result of circumstances unlikely to recur.
(30) The defendant is particularly likely to respond affirmatively to probationary treatment.
(31) The imprisonment of the defendant would entail excessive hardship to himself or his dependents.
(32) The defendant has voluntarily participated in a pretrial drug testing program.
(33) Any other relevant mitigating circumstance.
C. The court shall state for the record the considerations taken into account and the factual basis therefor in imposing sentence.
D. Immediately following the imposition of a felony sentence pursuant to this Article, the sentencing court shall advise the offender in open court of each of the following:
(1) Whether, pursuant to the provisions of La. R.S. 15:571.3, the offender's sentence is subject to diminution for good behavior.
(2) Whether the sentence imposed was enhanced pursuant to R.S. 15:529.1 et seq., Article 893.3, or any other relevant provision of law.
E. All victims of felonies who provide a written request to the Department of Public Safety and Corrections, which includes a mailing address, are entitled to receive a written report of the prospective term of imprisonment of their offenders. The Department of Public Safety and

Corrections shall furnish to the victim and the sentencing judge within ninety days of commitment a report which includes the following information, in a format to be determined by the Department of Public Safety and Corrections:
(1) The prospective release date of the offender should his sentence be subject to diminution of sentence for good behavior, to the extent that the report shall advise the offender that he may be released upon serving the certain percentage of his sentence as provided for by law.
(2) The prospective parole eligibility date of the offender should he be eligible for parole pursuant to R.S. 15:574.4 et seq., to the extent that the report shall advise the offender that he may be eligible for release upon serving a certain percentage of his sentence as provided by law.
F. However, no sentence shall be declared unlawful or inadequate for failure to comply with the provisions of Paragraph D.